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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KEVIN D. GRAY,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Is a confession which would qualify as a declaration against penal interest exempt from the rule of *Bruton* v. *United States* by virtue of being a firmly rooted exception to the hearsay rule?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE RESPONDENT

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the respondent. Counsel for respondent has consented, but counsel for petitioner has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case presents this Court with the chance to recognize the changes in the law that have taken place since *Bruton* v. *United States*, 391 U. S. 123 (1968). Declarations

against penal interest are now a firmly rooted exception to the hearsay rule. Therefore, codefendant confessions can now be admitted to inculpate defendants, reducing the need for *Bruton*. Allowing wider use of voluntary, probative, reliable confessions furthers the interests of truth and justice. Such a result is consistent with the interests of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

September, 1997

Respectfully submitted,

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Criminal Justice Legal Foundation

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE RESPONDENT

SUMMARY OF FACTS AND CASE

On November 10, 1993, Stacey Williams was beaten to death "by a group of six young men." *State* v. *Gray*, 687 A. 2d 660, 661 (Md. 1997).[1] Anthony Bell was arrested by police after a preliminary investigation of the killing. Bell, in a written statement to the police, implicated himself, Jacquin Vanlandingham, and petitioner Gray as participants in the killing. *Ibid.* Two days after Williams' death, Vanlandingham was shot to death in a seemingly unrelated incident. *Ibid.*, and n. 1.

Bell and Gray were tried jointly. The trial court denied Gray's motion to sever his and Bell's trials or to exclude Bell's

---

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

confession. *Ibid.* The trial court did order the redaction of Gray's and Vanlandingham's names from the confession. *Ibid.*

At trial, Shay Yarberough "the only witness to Williams' beating testified that he saw Vanlandingham lift Williams over his head and drop him on the sidewalk." *Ibid.* Yarberough also stated that Gray attempted to do the same, with less success. *Ibid.* He also testified that Gray along with the rest of the group "repeatedly kicked Williams about the ribs, neck, and head." *Id.*, at 661-662.

Detective Pennington testified that he arrested and interviewed Bell after investigating the crime. During the interview, Bell confessed, implicating both Gray and Vanlandingham. *Id.*, at 662.

A copy of Bell's confession was admitted, with blank white spaces replacing Gray's and Vanlandingham's names. *Ibid.* Defendant testified that he was at a nearby phonebooth calling his girlfriend during the beating. *Ibid.* Defendant's girlfriend affirmed this story, while another defense witness who claimed to have seen the beating placed defendant in a phonebooth "up the street" during the killing. Defendant was convicted of involuntary manslaughter. *Ibid.* The pertinent part of Bell's confession read:

> "Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> "Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> "Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?
>
> "Answer, hit, kicked.

> "Question, who hit and kicked Stacey?
>
> "Answer, I hit Stacey. He was kicked, but I don't know who kicked him.
>
> "Question, who was in the group that beat Stacey?
>
> "Answer, me, *deleted*, *deleted*, and a few other guys.
>
> "Question, did anyone pick Stacey up and drop him to the ground?
>
> "Answer, no, when I was there.
>
> "Question, what was the argument over between Stacey and *deleted*?
>
> "Answer, some money that Stacey owed *deleted*.
>
> "Question, how many guys were hitting on Stacey?
>
> "Answer, about six guys.
>
> "Question, do you have a black jacket with Park Heights written on the back?
>
> "Answer, yes.
>
> "Question, who else has these jackets?
>
> "Answer, *deletion*." *Id.*, at 667-668.

Before the confession's introduction, the jury was instructed to consider it against Bell only, and not Gray. *Id.*, at 668.

The Maryland Court of Special Appeals reversed, holding that the introduction of Bell's redacted confession violated *Bruton* v. *United States*, 391 U. S. 123 (1968). *Gray* v. *State*, 667 A. 2d 983, 985, 990-991 (1995). The Maryland Court of Appeals reversed, finding no *Bruton* violation. *State* v. *Gray*, 687 A. 2d, at 669.

SUMMARY OF ARGUMENT

Before deciding how a confession must be redacted in order to satisfy *Bruton* v. *United States*, this Court should first determine whether *Bruton* applies. If Bell's statement could be

admissible against Gray as a "firmly rooted" exception to the hearsay rule, *Bruton* does not apply. This case is an appropriate vehicle to determine how the passage of time has changed the need for *Bruton*.

None of this Court's decisions have categorically disqualified the penal interest exception under the Confrontation Clause. *Bruton*'s analysis is colored by the fact that when it was decided, declarations against penal interest were generally inadmissible. *Cruz* v. *New York* was simply an application of *Bruton*'s logic and underlying assumptions to the problem of interlocking confessions.

Lee v. *Illinois* must be read in light of the statement it rejected. Because the statement was apparently self-serving and motivated by revenge, it was not against declarant's interest. *Lee* only recognizes that such statements cannot qualify under the Confrontation Clause.

Williamson v. *United States* demonstrates that the status of declarations against penal interest under the Confrontation Clause is still undetermined. The fact that all members of this Court were willing to consider that such evidence is admissible under some circumstances demonstrates how much the law has changed since *Bruton*.

Under *Ohio* v. *Roberts* firmly rooted exceptions to the hearsay rule satisfy the Confrontation Clause. Declarations against penal interest fall within one such exception. Their initial exclusion from the declarations against interest exception was based on a misreading of the law by the House of Lords. This archaic view violates common sense. Justice Holmes, Dean Wigmore, and others demonstrated that people generally do not incriminate themselves lightly, and are thus unlikely to lie when they do so. The Holmes-Wigmore view has carried the day, as the declaration against penal interest exception is observed by most jurisdictions, including the federal courts.

The standard argument against the admissibility of this evidence, that the declarant has a motive to incriminate others, can and has been addressed by the courts. The most likely

motives to cause one to falsely inculpate another are currying favor, revenge, and exculpation. The first motive can be found by courts, and is minimized by the giving of *Miranda* v. *Arizona* warnings. Where the declaration is not made in custody, or where there has been no promise of leniency and the declarant was read his *Miranda* rights, there is no reason to suspect that the statement is an attempt to curry favor.

Revenge may be found from the facts. *Lee* demonstrates how this is done and how to address it. *Williamson* and *Lee* show that truly exculpatory statements are not against declarant's interest, and thus do not come within the exception.

The confession in the present case comes within the declaration against penal interest exception. Declarant Bell was read his *Miranda* warnings, and he neither was promised nor received any benefits from his confession. Where he implicated Gray, he implicated himself equally. As this was a statement a reasonable person in Bell's position would not make unless true, Bell's statements do not violate defendant's confrontation rights.

ARGUMENT

The rule of *Bruton* v. *United States*, 391 U. S. 123, 137 (1968), that admitting an accomplice's confession violates the confrontation rights of any codefendant incriminated by the confession, is based on the assumption that any statement in a confession inculpating third parties is inadmissible hearsay. *Id.*, at 128, n. 3; see also *Lee* v. *Illinois*, 476 U. S. 530, 552, n. 5 (1986) (Blackmun, J., dissenting). The present case presents the opportunity to examine *Bruton*'s reach in light of nearly two decades of development of evidence law.

The decision below turned on whether *Bruton* was properly applied by deleting the names of those other than the person confessing from the confession. See *State* v. *Gray*, 687 A. 2d 660, 667-669 (Md. 1997). *Amicus* submits that *Bruton* does not apply to the present case. Codefendant Bell's confession, while

hearsay, would qualify under the declaration against penal interest exception to the hearsay rule. See Part III, *post*. As this exception is now sufficiently "firmly rooted" as a hearsay exception to satisfy the Confrontation Clause, see Part II B, *post*, *Bruton* should not apply to appropriate uses of statements against penal interest that inculpate third party defendants.

If *Bruton* has been narrowed by developments in the law, this Court should address this issue before issuing further mandates on *Bruton*'s proper execution. In addition to limiting applications of the *Bruton* rule, this narrowing would also influence how the decision is applied. Since statements against penal interest are no longer per se inadmissible, as was the case when *Bruton* was decided, see 391 U. S., at 128, n. 3, the need for vigilance against purportedly improper inculpation may be relaxed. Thus the propriety of the use of the confession in the present case should be influenced by the rebirth of the declaration against penal interest as a generally accepted hearsay exception.

Amicus is not asking this Court to overrule *Bruton*; there will be times when the Confrontation Clause should bar a codefendant's confession from inculpating defendant. However, *Bruton* should be limited. Voluntary "[a]dmissions of guilt" are "not an evil but an unmitigated good . . . ." *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991). Rules excluding this evidence such as *Bruton*, should be limited to those instances where they clearly advance the cause of accuracy. The Confrontation Clause requires no more. See *United States* v. *Inadi*, 475 U. S. 387, 396 (1986).

I. Whether a declaration against penal interest satisfies the Confrontation Clause is an open issue.

Although the use of accomplice confessions to inculpate codefendants has led to the reversal of convictions by this Court, the practice has not been categorically banned under the Confrontation Clause. Instead, the decisions rejecting such

evidence have either assumed such evidence to be inadmissible, or have dealt with a statement that was not truly against the declarant's penal interest. The validity of declarations against penal interest is demonstrated by the federal penal interest rule, Federal Rule of Evidence 804(b)(3), and its interpretation in *Williamson* v. *United States*, 512 U. S. 594 (1994).

As noted earlier, the *Bruton* Court dealt with a hearsay statement against penal interest that was inadmissible as a matter of federal law.

> "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence . . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we *intimate no view whatever* that such exceptions necessarily raise questions under the Confrontation Clause." *Bruton* v. *United States*, 391 U. S. 123, 128, n. 3 (1968) (emphasis added).

The *Bruton* Court attacked the confession's inculpatory effect on the nonconfessing defendant. See *id.*, at 136 ("Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect"). This must be read in the context of its inadmissibility with respect to defendant.[2] The inherent suspicion accorded accomplice testimony is substantially a product of history; in many circumstances accomplice testimony is now given more credence than when *Bruton* was

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2. *Douglas* v. *Alabama*, 380 U. S. 415 (1965) is distinguishable for similar reasons. Douglas' accomplice Loyd, who had signed a written confession, had been tried separately and convicted. *Id.*, at 416. He was called to testify at Douglas' trial while his appeal was still pending, and invoked his self-incrimination privilege each time he was asked about the crime. *Ibid.* Loyd was then declared a hostile witness and his confession, which implicated Douglas, was read to him in the form of a series of questions. This evidence was inadmissible against Douglas under Alabama law, but the state appellate court held that Douglas waived his rights because he had "stopped objecting." *Id.*, at 418. Since Loyd could not be cross-examined on this inadmissible evidence, Douglas' confrontation rights were violated. See *id.*, at 420.

decided. See Part II B, *post*. *Bruton* is a product of its times. If times have changed, so should *Bruton*.

Cruz v. *New York*, 481 U. S. 186 (1987) applies *Bruton* to a narrow issue left unresolved in *Parker* v. *Randolph*, 442 U. S. 62 (1979). In *Parker*, the lead opinion held that where the defendant's and codefendant's confessions confirmed each other, or "interlocked," the codefendant's confession, "will seldom, if ever, be of the 'devastating' character referred to in *Bruton* . . . ." 442 U. S., at 73. Therefore, *Bruton* was unnecessary as the right of cross-examination "has far less practical value to a defendant who has confessed to a crime than to one who has consistently maintained his innocence." *Ibid.*

Cruz rejected this reasoning in a continuation of the assumptions and logic underlying *Bruton*:

> "While 'devastating' practical effect was one of the factors that *Bruton* considered in assessing whether the Confrontation Clause might sometimes require departure from the general rule that jury instructions suffice to exclude improper testimony, 391 U. S., at 136, it did not suggest that the existence of such an effect should be assessed on a case-by-case basis. Rather, that factor was one of the justifications for excepting from the general rule the entire category of codefendant confessions that implicate the defendant in the crime. It is impossible to imagine why there should be excluded from that category, as generally not 'devastating,' codefendant confessions that 'interlock' with the defendant's own confession." 481 U. S., at 191-192.

As *Cruz* was an application of *Bruton*'s analysis, it had to take as a given *Bruton*'s assumption that a defendant's statements against penal interest were generally inadmissible to inculpate a codefendant. The *Cruz* Court did, however, recognize that if this proposition did not hold in certain cases, then *Bruton* would be inapplicable. The *Cruz* Court noted that while the interlocking property of confessions was irrelevant to "*harmfulness*" it was relevant to "*reliability*." See *id.*, at 192 (emphasis in original). While an interlocking confession cannot

make admissible a confession that is not directly admissible, it can at least be part of the "indicia of reliability," to determine whether the codefendant's confession is "directly admissible against the defendant, . . . despite the lack of opportunity for cross-examination . . . ." *Id.*, at 193-194.

Lee v. *Illinois*, 476 U. S. 530 (1986) leaves unanswered the question left open in *Bruton*. *Lee* involved a confession implicating an accomplice that was made under particularly suspicious circumstances. Lee was at the police station in order to identify a badly burned body found in the housing complex in which she lived. *Id.*, at 532. A detective became suspicious when she started to cry as she examined photographs of the body. He read Lee her *Miranda* warnings, and asked her about her missing aunt. Lee eventually admitted that she and her boyfriend, Edwin Thomas, were involved in the stabbing of Lee's Aunt Beedie and her friend Odessa Harris, and that the body was her aunt's. *Ibid.* Lee was arrested and signed a written confession. *Ibid.* In her confession, Lee claimed that Thomas alone killed Odessa by stabbing her in the back, while she killed Aunt Beedie under circumstances strongly suggesting self-defense or a homicide less culpable than murder. See *id.*, at 533-534.

Thomas arrived at the police station as Lee was being interrogated. *Id.*, at 532. Lee had inculpated him enough by that point, however, that the officers advised Thomas of his *Miranda* rights, and then accused him of participating in the murders. *Ibid.* Thomas then stated that " 'he wanted to think about' talking to the police." *Ibid.*

After Lee finished confessing, the police allowed the lovers to meet. As the two kissed and hugged, an officer "asked Lee, in the presence of Thomas, 'what was the statement you had just given us implicating Edwin?' " *Id.*, at 533. After Lee told Thomas that he had said to her that " 'we wouldn't let one or the other take the rap alone,' " Thomas decided to talk. *Ibid.* His statement spread the blame, painting Lee as an active planner and participant in the murders. See *id.*, at 535. The two

were tried jointly without a jury, and both confessions were used against the defendants. See *id.*, at 536-537. The trial judge relied on Thomas' confession for finding Lee guilty of both murders. *Id.*, at 538.

The *Lee* Court rejected the contention that Thomas' confession came under an established hearsay exception.

> "We reject respondent's categorization of the hearsay involved *in this case* as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as a confession by an accomplice which incriminates a criminal defendant." *Id.*, at 544, n. 5 (emphasis added).

Footnote five must be read in the context of the evidence it rejected. The *Lee* Court had strong reason to doubt the veracity of Thomas' statements which effectively shifted the blame to Lee. It noted from the facts that Thomas may well have had a desire to fabricate his story out of retaliation against Lee or in order to spread the blame. *Id.*, at 544. This "theoretical motive" was backed up by the fact that "Thomas contemplated becoming a witness for the State against Lee." *Ibid.*

Thomas' statement is thus best viewed as not being a true declaration against Thomas' penal interest. See M. Graham, Federal Practice and Procedure: Evidence § 6795, p. 806, n. 8 (interim ed. 1992). Simply because some of Thomas' statements may have tended to incriminate him did not render it against his penal interest for the purpose of the hearsay exception. To label Thomas' dubious, blame-spreading statement as against his penal interest "defines too large a class for meaningful Confrontation Clause analysis." *Lee*, 476 U. S., at 544, n. 5. *Lee* only disapproved of an improper use of the penal interest question. The fate of a proper use of this rule is still undetermined.

This conclusion is reinforced by *Williamson* v. *United States*, 512 U. S. 594 (1994). In *Williamson*, Reginald Harris was arrested after a stop and search of his car yielded 19 kilograms of cocaine in two suitcases in the trunk. 512 U. S., at 596. Soon after the arrest, Harris was interviewed over the telephone by Special Agent Walton of the Drug Enforcement Agency. *Ibid.* Harris told Agent Walton that he received the cocaine from an unidentified Cuban in Fort Lauderdale, but that it actually belonged to Williamson and was to be delivered to a particular dumpster that night. *Ibid.* Harris subsequently fleshed out this story in a personal interview with Agent Walton. See *ibid.*

As Agent Walton started to arrange a controlled delivery of the cocaine, Harris changed his story. Harris said that he had lied about the Cuban and other details. *Id.*, at 597. Harris said that the truth was that he was transporting the cocaine to Atlanta for Williamson, who had been travelling in front of Harris in a rental car. Williamson, therefore, had seen Harris' car being searched by police, making a controlled buy impossible. See *ibid.*

Harris said that he lied because he feared Williamson. He did not want his story recorded, and refused to sign a written version of his confession. Walton testified that he made no promise of help to Harris other than reporting any cooperation to the Assistant United States Attorney. See *ibid.*

Harris refused to testify at trial, even after being given immunity and compelled by a contempt order. Therefore, the trial court allowed Agent Walton to relate Harris' story as a statement against penal interest, Fed. Rule Evid. 804(b)(3). *Ibid.* The Court of Appeals affirmed Harris' conviction against a Confrontation Clause attack. *Id.*, at 598.

In a partially divided opinion, the *Williamson* Court established the scope of Rule 804(b)(3). A majority of the Court held that in order to qualify as a statement against penal interest, the statement must be truly inculpatory; collateral statements would not qualify for the hearsay exception, even if linked to other self-inculpatory statements. See *id.*, at 600-601. The majority split over how to apply this holding to the case before the Court. Four of the six justice majority saw Harris' statement as inadmissible on its face as "Harris' arguably

inculpatory statements are too closely intertwined with his self-serving declarations to be ranked as trustworthy," *id.*, at 608 (Ginsburg, J., concurring in part, and concurring in the judgment), but would remand the case for harmless error analysis. *Id.*, at 610. The remaining members of the majority held that case should be vacated and remanded for further findings on whether Harris' statements were "truly self-inculpatory." See *id.*, at 604 (O'Connor, J.). The three remaining justices took a broader approach to Rule 804(b)(3) and would allow in some noninculpatory collateral statements. See *id.*, at 620 (Kennedy, J., concurring in the judgment). This concurrence would remand the case for analysis under its standard. *Id.*, at 621.

Although this case did not reach the Confrontation Clause issue, see *id.*, at 605 (O'Connor, J.), the part of the lead opinion not joined by a majority of the Court hints that statements against penal interest may sometimes inculpate third party defendants without violating the Confrontation Clause. "We note, however, that the very fact that a statement is genuinely self-inculpatory—which our reading of Rule 804(b)(3) requires—is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Ibid.* (citing *Lee*, *supra*, 476 U. S., at 543-545). This statement left undecided the question of whether the statement against interest exception "is 'firmly rooted' for Confrontation Clause purposes." *Ibid.*

Neither of the other opinions generally banished statements against penal interest under Confrontation Clause grounds. Justice Ginsberg's concurrence did cite Confrontation Clause precedents in support of the assertion that statements implicating others have trustworthiness and Confrontation Clause problems. See *id.*, at 608. These concurring justices formed the part of a majority opinion that at least contemplated admitting such statements against codefendants. See *id.*, at 603 (majority). While Justice Kennedy's concurrence does not address the Confrontation Clause, the fact that it takes a broader view than the majority of what is admissible under the penal interest exception, see *id.*, at 616 ("the conclusion reached by the Court today—would 'eviscerate the against penal interest exception' "), strongly implies a willingness to admit at least some statements against penal interest over Confrontation Clause objections.

Williamson did not fix the relationship between statements against penal interest and the Confrontation Clause. The Court was confronted with a statement that in some ways looked even less credible than the one summarily rejected in *Lee*. The confession in *Lee* implicated both defendants equally, see *ante*, at 9; the confession in *Williamson* portrayed Harris as a little fish acting under the direction of the much larger catch, Williams. See *ante*, at 11. Harris' confession contradicted an earlier one he made on several key points, and he refused to make a written statement of it. See *ante*, at 10-11. In spite of this, a majority of this Court was willing to consider the possibility that Harris' unredacted statement was still admissible. See *id.*, at 605 (O'Connor, J.); *id.*, at 621 (Kennedy, J., concurring).

This is a very far distance traveled from a *Bruton* opinion which abruptly dismissed similar evidence in a footnote. See *ante*, at 7. *Williamson* and Rule 804(b)(3) reflect more than a change in federal evidence law. They represent the penal interest exception's coming of age. The now-firm rooting of this doctrine has crucial implications for *Bruton* and the Confrontation Clause it sought to interpret.

II. An appropriately interpreted declaration against penal interest exception is sufficiently firmly rooted to satisfy the Confrontation Clause.

A. The Roberts Rule.

The seemingly straightforward language of the Confrontation Clause ("the accused shall enjoy the right . . . to be confronted with the witnesses against him") creates a problem. Courts seem to have but one of two choices for the Confrontation Clause. At one extreme, the clause would prevent any

hearsay testimony from being admitted against criminal defendants. The other approach distinguished between witnesses and declarants. The Confrontation Clause would apply only to actual witnesses against the defendant. See *Dutton* v. *Evans*, 400 U. S. 74, 95 (1970) (Harlan, J., concurring). Cross-examination of testimonial statements which are given " 'infra-judicially,' " such as dying declarations, would be governed by the law of evidence instead of the Constitution. See *id.*, at 94. Resolving this question is made even more difficult by the relatively scant history concerning the framers' intent behind the words of the Confrontation Clause. See *White* v. *Illinois*, 502 U. S. 346, 359 (1992) (Thomas, J., concurring); *Dutton*, 400 U. S., at 95 (Harlan, J., concurring).

This Court resolved the hearsay dilemma by choosing a third way. It was impractical and unfair to ban a whole body of often trustworthy and highly probative evidence from the prosecution's arsenal. Thus, this Court rejects this approach, which "would abrogate virtually every hearsay exception, . . . as unintended and too extreme." *Ohio* v. *Roberts*, 448 U. S. 56, 63 (1980). Nor has it adopted the limited, physical confrontation approach, see *White*, 502 U. S., at 352, in spite of its formidable adherents and their strong arguments on its behalf. See *Dutton*, 400 U. S., at 93-100 (Harlan, J., concurring); 5 J. Wigmore, Evidence § 1397, p. 159 (Chadbourn rev. 1974). Instead, this Court has found "success in steering a middle course among proposed alternatives" for the Confrontation Clause, *Ohio* v. *Roberts*, 448 U. S., at 68, n. 9, by examining the reliability of the hearsay statement. See *id.*, at 65-66. Therefore, hearsay testimony with sufficient "indicia of reliability" may be admitted against defendant under the Confrontation Clause. See *Mancusi* v. *Stubbs*, 408 U. S. 204, 213 (1972).[3]

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3. This requirement typically also requires the witness to be unavailable. See *ibid.* Sometimes, however, unavailability does not have to be proven. See *Roberts*, 448 U. S., at 65, n. 7. When the *Bruton* rule is at issue, the declarant will typically be unavailable by claiming the self-incrimination privilege. See *Lee* v. *Illinois*, 476 U. S. 530, 549, n. 3 (1986) (Blackmun, J., dissenting).

This approach carries its own burdens. Because this middle way and the hearsay rule serve such similar interests, see *California* v. *Green*, 399 U. S. 149, 155 (1970), and have such similar roots, see *Dutton*, *supra*, 400 U. S., at 86, there is a danger of this Court's confrontation decisions subverting the development of the hearsay rule. See *id.*, at 86, n. 17 (plurality). Although close, the Confrontation Clause and the hearsay rule should not be and are not the same. The states are the primary enforcers of criminal law, see *Patterson* v. *New York*, 432 U. S. 197, 201 (1977), and their rules governing criminal trials should generally be left untouched by the federal courts. See *Harris* v. *Alabama*, 513 U. S. 504, 512 (1995). A case-by-case examination of the individual reliability of each hearsay statement admitted against a defendant would turn the hearsay rule into a quagmire. "Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of rules of evidence applicable in criminal proceedings." *Roberts*, 448 U. S., at 64. Turning the Confrontation Clause into a case-by-case statute for the hearsay rule frustrates these compelling interests.

Roberts addressed these concerns. In addition to allowing the state to prove the reliability of hearsay on a case-by-case basis, the *Roberts* Court held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.*, at 66.

This shines a light through the potentially dark muddle of the Confrontation Clause. Focusing on hearsay exceptions comports with how the hearsay rule is applied; a general rule against hearsay subject to numerous specific exceptions.[4] See Fed. Rules Evid. 801-806; 5 J. Wigmore, *supra*, § 1366, at 28-29 (dividing hearsay rule into the rules requirements, its exceptions, nontestimonial utterances to which the rule does not apply, and applying the rule to statements of the tribunal).

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4. The "catch-all" hearsay exception, see, *e.g.*, Fed. Rule Evid. 803(24), is not a firmly rooted exception under *Roberts*. See *Idaho* v. *Wright*, 497 U. S. 805, 817 (1990).

The *Roberts* rule is respectful of, but not wedded to, history. A long recognized exception is more likely to contain sufficient "indicia of reliability" to satisfy the Confrontation Clause. See *Mancusi* v. *Stubbs*, 408 U. S. 204, 213 (1972) (noting long acceptance of prior recorded testimony). Since the hearsay rule, like the Confrontation Clause, is motivated by accuracy, compare *Tennessee* v. *Street*, 471 U. S. 409, 415 (1985) (purpose of Confrontation Clause to advance the accuracy of trials) with 5 Wigmore, *supra*, § 1362, at 3 (purpose of hearsay rule to test assertions of witnesses through cross-examination), common sense dictates that those exceptions which best promote accuracy will survive the test of time.

The Confrontation Clause does not, however, petrify the hearsay rule. The best description of the adaptability that is the essence of this Court's Confrontation Clause jurisprudence comes from *Roberts*. "True to the common-law tradition, the process has been gradual, building on past decisions, *drawing on new experience, and responding to changing conditions*." 448 U. S., at 64 (emphasis added). This is a necessity in a body of law as organic as the law of evidence. "The rules of evidence in the main are based on experience, logic, and common sense, less hampered by history than some parts of the substantive law." *Donnelly* v. *United States*, 228 U. S. 243, 277-278 (1913) (Holmes, J., dissenting). Therefore, "[t]he Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay exceptions.' " *Roberts*, 448 U. S., at 64-65 (quoting *Green*, *supra*, 399 U. S., at 162).

This Court has upheld many of the hearsay exceptions against Confrontation Clause attack. One of its earliest confrontation cases upheld the dying declaration exception. See *Mattox* v. *United States*, 156 U. S. 237, 243 (1895); see also Fed. Rule Evid. 804(b)(2). The Court has also upheld cross-examined prior testimony, see *Mancusi*, 408 U. S., at 213-216; see also Fed. Rule Evid. 804(b)(1), and the statement of a co-conspirator made in furtherance of the conspiracy. See *Bourjaily* v. *United States*, 483 U. S. 171, 183 (1987); see also Fed. Rule Evid. 801(d)(2)(E).

The one commonly recognized exception that does not satisfy *Roberts* is the residual exception for statements not covered by a specific exception that has "equivalent circumstantial guarantees of trustworthiness . . . ." Fed. Rule Evid. 803(24). In *Idaho* v. *Wright*, 497 U. S. 805, 817 (1990), this Court came to the necessary conclusion that this broad, unspecific standard could not be "a firmly rooted hearsay exception for Confrontation Clause purposes."[5] Unlike a standard hearsay exception, which "satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements," *ibid.*, the residual exception embodied a very different purpose. "The residual hearsay exception, by contrast, accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial." *Ibid.* Because this exception is so diffuse, if the Court were "to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take." *Id.*, at 817-818.

This Court examines hearsay exceptions under the Confrontation Clause through a combination of common sense and a respect for the collective wisdom of legislatures and the courts, which gives its cases a "common-law tradition . . . ." *Roberts*, 448 U. S., at 64. As the next section will demonstrate, declarations against penal interests are now part of that tradition. The rationale behind the exception makes sense, and its common sense is reflected in the many jurisdictions that accept this rule. It is time for this Court to admit declarations against penal interest into the family of firmly rooted hearsay exceptions.

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5. *Wright* dealt with Idaho's residual hearsay exception which was taken verbatim from the Federal Rules of Evidence. See 479 U. S., at 811-812; Idaho Rule Evid. 803(24).

B. The Firmly Rooted Exception.

The law of evidence has now evolved to the point that statements against penal interest can be considered a "firmly rooted" exception to the hearsay rule under *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980). The sheer common sense of the proposition that people only rarely falsely incriminate themselves is a strong argument for its general acceptance, as Justice Holmes so eloquently explains:

> "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick. —The rules of evidence in the main are based on experience, logic, and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man, (*Mattox* v. *United States*, 146 U. S. 140); and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight." *Donnelly* v. *United States*, 228 U. S. 243, 277 (1913) (Holmes, J., dissenting).

The declaration against interest exception, like most other exceptions to the hearsay rule, developed in the early eighteenth century. 5 J. Wigmore, Evidence § 1455, p. 323 (Chadbourn rev. 1974). The "arbitrary limit" of this rule to exclude statements against penal interests came about in a poorly argued and reasoned decision of the House of Lords limiting the rule to statements against pecuniary or proprietary interest. See *id.*, at 351; *Sussex Peerage Case*, 11 Cl. & F. 85, 110, 8 Eng. Rep. 1034, 1044 (1844). Although this decision was contrary to previous interpretations of the rule, see Wigmore, at 350, it was accepted in both England and the United States. See *id.*, at 351-352.

This policy was wrong from its inception.

> "Was the practice of excluding third-person confessions in criminal cases justified? It certainly could not be justified on the ground that an acknowledgment of facts rendering one liable to criminal punishment is less trustworthy than acknowledgment of a debt. The motivation for the exclusion was no doubt a different one, namely, the fear of opening the door to a flood of witnesses testifying falsely to confessions that were never made or testifying truthfully to confessions that were false. This fear was based on the likely criminal character of witness and declarant, reinforced by the requirement that declarant must be unavailable, which made perjury easier to accomplish and more difficult to punish." 2 J. Strong, McCormick on Evidence § 318, p. 340 (4th ed. 1992).

The distinction from the other accepted hearsay exceptions was senseless. "This is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of evidence, . . . the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it's notorious that some witnesses lie and that it is difficult to avoid being deceived by their lies." 5 Wigmore, *supra*, § 1477, pp. 358-359.

Wigmore and Holmes argued to admit statements against penal interest in the context of third party confessions exonerating criminal defendants. See *id.*, at 359; *Donnelly*, 228 U. S., at 277 (Holmes, J., dissenting). There is no reason inherent to the Confrontation Clause to limit declarations against penal

interest to those exonerating the accused. The Confrontation Clause is concerned with accuracy, see *United States* v. *Inadi*, 475 U. S. 387, 396 (1986), and accuracy is a two-edged sword. If justice is due equally to the accused and accuser, see *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934), then so is accuracy.

The standard modern argument for excluding the inculpatory use of statements against penal interest is that, while under arrest, a codefendant has "strong motivation to implicate the defendant and to exonerate himself" making any statements "about what the defendant said or did are less credible than ordinary hearsay evidence." *Bruton* v. *United States*, 391 U. S. 123, 141 (1968) (White, J., dissenting).

Three related motivations—currying favor, revenge, and exculpation—are most likely to cause someone to implicate another falsely while also implicating oneself. Currying favor from the authorities, a motive recognized by the drafters of rule 804(b)(3), see Advisory Committee's Notes on Fed. Rule Evid. 804, 28 U. S. C. App., p. 790; see also *Williamson* v. *United States*, 512 U. S. 594, 601 (1994), can be identified and addressed by the courts. The requirement that suspects be informed of their rights before custodial interrogation, under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), helps to minimize the threat. The *Miranda* warnings minimize such dangers by informing the suspect "that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." *Id.*, at 469.

Where a defendant has been informed of his rights, and no promises of leniency were made, there is no reason to exclude declarations against penal interest. See, *e.g.*, *Williamson*, 512 U. S., at 620 (Kennedy, J., concurring in judgment); *United States* v. *Garcia*, 897 F. 2d 1413, 1421 (CA7 1990); *United States* v. *Scopo*, 861 F. 2d 339, 348 (CA2 1988). Any problem with efforts to curry favor should therefore be easy to control.

Exculpation and revenge are motives found in *Lee* v. *Illinois*, 476 U. S. 530 (1986). The relative ease with which the *Lee* Court uncovered them demonstrates that these difficulties

are also readily controllable. The bare facts before the Court strongly intimated the unacceptable motives behind Thomas' confession.[6] Revenge was inferred from codefendant Thomas' knowledge that Lee had implicated him, and that he had almost testified for the prosecution. See *id.*, at 544. Thomas' self-exculpatory motive was similarly inferable as the nature of his statement showed a desire to shift blame from himself alone to a shared blame with the person who implicated him. See *ibid.* Separating the hearsay chaff from the declaration against penal interest wheat in this manner is something that courts do routinely. See 2 Strong, *supra*, § 319, p. 346, n. 21 (discussing cases).

With so strong a measure of common sense behind it, it is understandable that the declaration against penal interest is now a "firmly rooted" exception to the hearsay rule. The arguments of Wigmore and Holmes spread throughout the courts, leading to a relaxation of the rule excluding declarations against penal interest. See *id.*, at 340-341. The penal interest exception is now recognized by the federal system, see Fed. Rule Evid. 804(b)(3), and by most of the states. See 5 Wigmore, *supra*, § 1477, pp. 360-362, n. 7, and 1997 Supp., at 587-593. Therefore, declarations against penal interest are "firmly rooted" enough to satisfy *Ohio* v. *Roberts*, *supra*, and the Confrontation Clause. See *United States* v. *Seeley*, 892 F. 2d 1, 2 (CA1 1989) (Breyer, J.); see also *Churro* v. *United States*, 4 F. 3d 436, 437 (CA6 1993); *United States* v. *Nazemian*, 948 F. 2d 522, 530-532 (CA9 1991).

The initial rejection of this exception by the House of Lords, and the initial decision of American courts to follow this accident of history, should not change the analysis. The *Roberts* rule and this Court's other Confrontation Clause cases are marked by a respect, but not reverence, for history. See *ante*, at 16-17. This Court does not use the Confrontation Clause to

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6. For a detailed description of the facts in *Lee*, see *ante*, at 9-10.

stifle needed reforms of the law of evidence with historical baggage.

> "Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well." *Dutton* v. *Evans*, 400 U. S. 74, 86-87, n. 17 (1970) (plurality) (internal quotations omitted).

The move from the *Sussex Peerage Case* to Rule 804(b)(3) is a needed reform that allows reliable evidence into the courtroom. The Confrontation Clause should not be invoked to squelch it.

III. Because the statement in the present case would qualify as a declaration against penal interest, *Bruton* does not apply.

Before any analysis of Bell's confession as a declaration against penal interest, it is necessary to establish the relevance of attaching this classification to the statement. The confession was not admitted against Gray; the trial court instructed the jury not to consider the confession against Gray. See *State* v. *Gray*, 687 A. 2d 660, 668 (Md. 1997). This does not effect the confession's validity under the Confrontation Clause. The initial decision to admit the confession against Gray as a declaration against penal interest is a question of state, not federal, law. See *Estelle* v. *McGuire*, 502 U. S. 62, 67-68 (1991). Before the trial court's application of *Bruton* can be improper, *Bruton* must apply. If Bell's confession comes within

the declaration against penal interest exception, then it cannot violate the Confrontation Clause, rendering *Bruton* irrelevant.

Maryland did more than it had to when it insulated Gray from Bell's confession. It could have admitted Bell's confession against Gray as a declaration against penal interest without violating the Confrontation Clause. The fact that Gray was given more protection than he was entitled to does not render his conviction unconstitutional.

Bell's confession is a declaration against penal interest. The confession has the appropriate circumstantial indicia of reliability. Bell was read his *Miranda* rights and waived them before confessing. See Joint Appendix ("JA") 54. He was not given any inducements for talking, see *ibid.*, and he received no plea bargain, being charged with the same offenses as Gray. See *id.*, at 14. Such assurances strongly rebut any notion that Bell was motivated to tell anything other than the truth.

The text of the confession is consistent with this reading of Bell's motive. The overwhelming bulk of Bell's statement implicates himself alone or equally with named or anonymous accomplices. See *State* v. *Gray*, 687 A. 2d, at 667-668; *ante*, at 2-3. Even in its unredacted form, the confession does not try to exculpate Bell or shift blame towards Gray.

> "(Q) What can you tell me about the beating of Stacey Williams that occurred on 10 November 1993
>
> "(A) An argument broke out between Tank and Stacey in the 500 bl[oc]k [of] Louden Ave. Stacy got smashed and then ran onto Wildwood Parkway. Me Tank [Vanlandingham], Kevin [Gray (defendant)] and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up we walked him back to Loudon Ave I then walked over and used the phone. Stacey and the others walked down Loudon
>
> "(Q) When Stacey was beaten on Wildwood Parkway, how was he beaten
>
> "(A) Hit, kicked

"(Q) Who hit and kicked Stacey

"(A) I hit Stacey, he was kicked but I don't know who kicked him

"(Q) Who was in the group that beat Stacey

"(A) Me, Tank, Kevin and a few other guys

"(Q) Do you have the other guys names

"(A) Tank, Kevin and me, I don't remember who was out there

"(Q) Did anyone pick Stacey up and drop him to the ground

"(A) No when I was there.

"(Q) What was the argument over between Stacey and Tank

"(A) Some money that Stacey owed Tank

"(Q) How may guys were hitting on Stacey

"(A) About six guys

"(Q) Do you have a black jacket with Park Heights written on the back

"(A) Yeh

"(Q) Who else has these jacket.

"(A) Tank, Kevin

"(Q) After reading this statement would you sign it

"(A) Yes." J. A. 61-63 (internal references omitted).

Every instance where Gray is inculpated by name, Bell equally inculpates himself. The only subject where Bell does not implicate himself is the reason for the beating, the argument between Tank [Vanlandingham] and the victim, Williams, over money Williams owed Tank. As Gray is not implicated by this statement his confrontation rights are not threatened. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses *against him* . . . ." U. S. Const.,

Amdt. 6 (emphasis added). Although this passage might not qualify as a declaration against penal interest in the federal courts, see *Williamson* v. *United States*, 512 U. S. 594, 600-601 (1994), a state court may make a contrary interpretation of the rules of evidence without violating the Constitution. See *Estelle* v. *McGuire*, 502 U. S. 62, 67-68, and n. 2 (1991).

Bell may have attempted to protect Gray during the confession. While Bell claims not seeing anyone trying to pick Williams up and throw him down the only eyewitness to testify identified Gray as trying to do this. *Gray*, 687 A. 2d, at 661. This, and the rest of Bell's testimony sharply contrasts with the blatant attempt to shift blame in *Lee* v. *Illinois*, 476 U. S. 530 (1986), see *ante*, at 9, or the declaration in *Williamson* v. *United States*, 512 U. S. 594 (1994). See *ante*, at 11.

The contrast with *Williamson* is particularly telling. As noted earlier, the declarant, Harris, told contradictory stories about Williamson's culpability, first downplaying Williamson's role, then stating that he had lied, and that Williamson was the source of the drugs. See *ante*, at 10-11. Harris' second story, the one admitted at trial, painted Williamson as the leader and Harris as no more than a courier. See *id.*, at 597. In spite of this, the case was remanded to the lower court so that it could determine whether Harris' statement was admissible as a declaration against penal interest. See *id.*, at 604 (O'Connor, J.); *id.*, at 621 (Kennedy, J., concurring).

Bell's confession in the present case is much more clearly self-inculpatory than the one in *Williamson*. Bell does not shift responsibility. Instead, he properly shares it with his accomplices. The sharing of guilt is not a form of exoneration; it reflects the nature of the crime, a savage beating perpetrated by several men. "Moreover, a declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissable merely because the declarant names another person or implicates a possible codefendant." *Id.*, at 606 (Scalia, J., concurring).

Bell, Gray, and others were part of a savage group beating of Stacey Williams, a fact confirmed by the eyewitness testimony. See *Gray*, 687 A. 2d, at 661-662. Implicating Gray and others in Williams' killing was not "in a context where the declarant is minimizing culpability or criminal exposure." *Williamson*, 512 U. S., at 607 (Scalia, J., concurring). It was the truth. Bell's confession was

> "a statement which . . . at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Fed. Rule Evid. 804(b)(3).

Since admitting such a statement does not violate a defendant's confrontation rights, see Part II, *ante*, Gray's right to confrontation has not been violated, no matter how effective the trial court was in redacting his name from Bell's confession.

CONCLUSION

The decision of the Maryland Court of Appeals should be affirmed.

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Respectfully submitted,

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